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MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 84

WILLIAM L. GREENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY BRIEF

The Brief for the United States is but another step in the prolonged effort to deprive petitioner of restitution for his acknowledged economic losses. By invoking the irrelevant doctrine of exhaustion of administrative remedies and by reinterpreting and reamending administrative regulations, the United States seeks to avoid the dictates of common justice and the plain impact of this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474.

1. The Central Issue in This Case is the Proper Interpretation and Application of Paragraph 26 of the 1955 Directive. An Issue Entirely Unrelated to the Doctrine of Exhaustion of Administrative Remedies

The basic premise of the Government's position on the exhaustion principle rests on a dubious and challenged reading of Paragraph 26. To the authors of the Government's Brief (pp. 11, 12) it is very plain and obvious that Paragraph 26 conditions monetary restitution upon a further administrative determination as to petitioner's present eligibility for an unwanted access authorization. But it is precisely at the interpretation, at that reading of Paragraph 26, where petitioner parts company with the Government. Petitioner submits that the wording, the context and the purpose of Paragraph 26 belie the Government's interpretation and that the thrust of the *Greene* v. *McElroy* decision is such as to entitle petitioner to immediate restitution without further administrative proceedings.[1]

The focal point of this case is thus the proper interpretation and application of Paragraph 26. If petitioner's view is correct, the right to restitution has already accrued quite apart from any additional access authorization procedure that is available or that is offered. Indeed, the necessary consequence of the Government's position would confirm the accrual of that right once Paragraph 26 is read as petitioner suggests. The whole of the exhaustion argument rests upon nothing more substantial than a questionable interpre-

[1] To the extent that restitution under Paragraph 26 is the equivalent of any claim for money pursuant to the Fifth Amendment, the Fifth Amendment problems disappear and the Court need not enter the constitutional thicket suggested by the Government's Brief (pp. 18-29).

tation of Paragraph 26; if that interpretation is wrong, the exhaustion point totally disappears. And even if the Government's interpretation be accepted, the resulting denial of relief to petitioner is explainable in terms of a failure to state a cause of action rather than in terms of a failure to exhaust administrative procedures relative to monetary relief.[2] If in truth Paragraph 26 validly conditions the liability of the United States upon an administrative ruling as to current access eligibility, petitioner's suit in the Court of Claims falls for lack of a claim against the United States founded upon "any regulation of an executive department" within the jurisdictional bounds of 28 U.S.C. § 1491.

Moreover, if Paragraph 26 is to be read as petitioner contends it must be read, the action of the Court of Claims in suspending proceedings pending pursuit of further administrative remedies raises serious jurisdictional problems. The Court of Claims has been invested by Congress with jurisdiction to entertain and resolve claims against the United States founded upon executive department regulations. 28 U.S.C. § 1491. To withhold jurisdiction pending exhaustion of further administrative proceedings not required in accordance with some statutory scheme is to engraft a disability upon § 1491 which Congress has not authorized. Cf. *Soriano* v. *United States*, 352 U.S. 270, 274-

[2] The only true "exhaustion" principle at this juncture is the exhaustion of petitioner's monetary claim in the Department of Defense prior to institution of suit in the Court of Claims. Petitioner undeniably exhausted the possibilities in that respect. After considering the claim for nearly a year and a half, the Department of Defense determined "that Mr. Greene does not qualify for monetary restitution under the provisions of Paragraph 26." R. 5-6.

275; *Clyde* v. *United States*, 13 Wall. 38. This the Court of Claims may not do.

Hence the critical nature of the interpretative problem becomes clear. It is that problem rather than the exhaustion concept, that contains the key to this case. If petitioner has satisfied the requirements of Paragraph 26, nothing in the Government's Brief contests petitioner's right to monetary restitution pursuant to that Paragraph.

2. Petitioner Has Satisfied the Plain Requirements of Paragraph 26, Thereby Entitling Him to Immediate Monetary Restitution

Paragraph 26 of the 1955 Directive says quite simply that monetary restitution is allowable for loss of earnings "where a final determination is favorable to a contractor employee." The circumstances of this case clearly demonstrate that such a final and favorable determination has been rendered as to this petitioner.

The decision and judgment entered by this Court in *Greene* v. *McElroy* in 1959 had two necessary consequences in terms of satisfying the requirements of Paragraph 26:

(1) The decision in and of itself represents a conclusive and favorable determination with respect to this petitioner. While this Court carefully refrained from entering into or deciding the merits of petitioner's security status, it nonetheless rendered a final ruling—favorable to petitioner—relative to the absence of any authorization for depriving petitioner of his job. That ruling voided the only impediment that existed during the years in question to the continuation of petitioner's employment by ERCO; it held that there was no authority for depriving him of that em-

ployment in a proceeding lacking the elements of cross-examination and confrontation. But for the unauthorized action of the Government, petitioner would have continued his work at ERCO and would have proceeded in his career as an aeronautical engineer.

Such a final determination as to the absence of authority so to deprive petitioner of his employment opportunities is as final, as meaningful and as favorable —insofar as the past period is concerned—as would be a final determination grounded on eligibility for access authorization. Certainly adjudications as to basic authority are as consequential and as final as those concerning substantive merits.

The possibility that the Government might have used other techniques to deprive petitioner of his job during the years in question is irrelevant. Cf. *Vitarelli* v. *Seaton*, 359 U.S. 535, 545. Equally immaterial is the subsequent attempt in 1960 to provide the Presidential authorization which was found lacking as to prior years. The critical fact is that this Court has conclusively determined that at least prior to July of 1960 there was no authority to deprive petitioner of his job. In that simple fact lies the "final determination . . . favorable to a contractor employee," to wit, this petitioner, within the meaning of Paragraph 26.

(2) Alternatively, yet consistent with the foregoing factor, the decision in *Greene* v. *McElroy* reinstated a prior final administrative determination favorable to petitioner on the merits of his access eligibility for the years in question. On remand from this Court and with the consent of the Government, the District Court entered an order which voided and expunged all adverse security determinations and rulings. Such expungement included all "final" adverse determinations but

left unaffected any "final" favorable determinations as to petitioner's security status.

Thus the last and the only determination now appearing in petitioner's lengthy security file is the "final" action of the IERB on January 29, 1952, authorizing petitioner to work on Secret contract matters for ERCO. 360 U.S. at 480. This "final" determination, it must be noted, was premised upon the identical charges and the identical considerations that were involved in the later adverse determinations. See 360 U.S. at 484-486. Those subsequent determinations, all of which have been expunged, were in essence merely reconsiderations of the IERB decision of 1952. And by virtue of the expungement order, the finality and the effectiveness of this 1952 administrative decision have been reinstated—at least for the period between petitioner's discharge on April 23, 1953, and the expungement order of December 14, 1959.

Petitioner's case is accordingly one, in the language of Paragraph 26, where "a final determination is favorable to a contractor employee" for the period involved, entitling him to reimbursement "in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance." The suspension of employment rights in this instance has been found by the Court to be totally unauthorized and void. And by judicial action the only final administrative action that can be recognized during the interim period is the reinstated "final" and "favorable" IERB ruling of 1952.

3. The Government's Interpretation of Paragraph 26 Is Contrary to Its Plain Meaning, Its Obvious Purpose, and the Necessary Impact of the Greene v. McElroy Decision

The United States concedes (Brief, pp. 9, 14, 15) that petitioner's monetary restitution claim was filed under, and must ultimately be judged by, the provisions of Paragraph 26 of the 1955 Directive. But in so doing, the Government has confused and entwined the provisions of Paragraph 26 of the 1955 Directive with those of Paragraph V.C. of the 1960 Directive. The result is a hopeless admixture of two different regulations. And it is a result rendered even more intolerable by the *ad hoc* amendments and exceptions read into the regulations in the Government's Brief.

(1) While acknowledging that the prime condition to be satisfied under Paragraph 26 is the obtaining of "a final determination . . . favorable to the contractor employee" (Brief, p. 11), the United States argues that such a determination relates only to an *administrative restoration* of eligibility for access to classified information (Brief, p. 11). To sustain that argument, however, the Government points not to the 1955 Directive or to Paragraph 26 thereof but to the 1960 Directive. "As the current provision makes clear," says the Brief (p. 13), "that determination is properly one to be made at the administrative level." Thus by an artful blending of the two Directives, the Government seeks to read the word "administrative" into Paragraph 26.

That such an effort is impermissible is dictated by the plain language of Paragraph 26. The reference therein to a "final determination" which is "favorable to the contractor employee" admits to no distinction between an administrative and a judicial deter-

mination of a final nature.[3] The Department of Defense, in framing the subsequent 1960 Directive, conceded as much by casting the analogous provision of Paragraph V.C. in terms of "a final administrative determination."[4] The absence of the word "administrative" in Paragraph 26 can mean only one thing—that a final and favorable determination by any person, board or tribunal with authority to render such a ruling entitles the employee to recover montary restitution. And the most obvious instance of a non-administrative determination is that rendered by a judicial tribunal, making a final determination that voids adverse and unauthorized administrative rulings and reinstating an earlier final administrative grant of

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[3] The language of Paragraph 26 in this respect is identical with that appearing in the immediately preceding industrial security regulations, Paragraph 23 of the Industrial Personnel and Facility Security Clearance Program, May 4, 1953. That provision authorized reimbursement "In cases where a final determination is favorable to a contractor employee."

But in an earlier regulation, Paragraph 4(d) of the Procedures Governing Appeals to the Industrial Employment Review Board, November 7, 1949, as revised November 10, 1950, it was provided that "When the Board sets aside a decision involving an individual," the Board may recommend reimbursement.

Cf. Act of August 26, 1950, 64 Stat. 476, as amended by the Act of July 29, 1958, 72 Stat. 432, 5 U.S.C. 22-1, dealing with monetary restitution for Government employees who are reinstated following suspension or dismissal for security reasons. That provision authbrizes monetary restitution when the agency head, in his discretion, reinstates or restores the employee to duty.

[4] As a general principle of construction, applicable to statutes and administrative regulations alike (*Miller* v. *United States*, 294 U.S. 435, 439), it will be presumed that the purpose of an amendment or addition is to make a change in existing law. See *Mogis* v. *Lyman-Richey Sand & Gravel Corp.*, 189 F. 2d 130, 141 (C.A. 8); and see *United States* v. *Bashaw*, 152 U.S. 436.

clearance. That was precisely the type of "final determination" rendered by the District Court in this case, acting pursuant to this Court's judgment in *Greene* v. *McElroy*.

(2) The Government's proposed reading of Paragraph 26 is also said (Brief, pp. 11-12) to be "compelled by the context" in which it appears in the 1955 Directive, a regulation providing for administrative review of preliminary denials or revocations of clearance and culminating in ultimate reconsideration or reversal by the Secretary of Defense.

The immediate "context" of Paragraph 26, of course, relates to an acknowledgement by the Department of Defense that equity and justice require that those employees who have been unfairly deprived of their jobs by the actions of Governmental security officers should be compensated for their losses. See Petitioner's Main Brief, p. 28. Paragraph 26, in other words, concerns the conditions surrounding the obligation of the Government to pay for past or accrued economic losses suffered by contractor employees. It does not purport to authorize or contemplate further administrative proceedings in addition to any "final determination" that has already been rendered.

Nor does the general "context" of Paragraph 26 support the Government's reading. Every statute or regulation establishing an administrative process has a self-contained administrative finality. Such finality was obtained in the instant case when, following a series of "final" security clearances, the Secretary of the Navy summarily determined in 1953 that petitioner's continued access to classified Navy information was inconsistent with the best interest of national

security, a determination reaffirmed on reconsideration by the EIPSB in 1954 and by the Director of the Office of Industrial Personnel Security in 1956.

But superimposed on most administrative procedures after the rendition of a final administrative ruling is the process of judicial review. When that judicial review occurs and results in a judicial determination as to either the substantive or procedural validity of the administrative action, a new and binding "final determination" has been rendered; whatever may be the language of the administrative regulation in question. And it has been "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 113-114.

Thus the context of Paragraph 26 and the 1955 Directive must of legal necessity encompass final judicial determinations favorable to the contractor employee—including determinations relative to procedural or jurisdictional defects. When this Court determined that the Department of Defense officials lacked authority to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination, there was a "final determination" favorable to the petitioner both within the literal words and the context of Paragraph 26. The fact that the Court found it unnecessary to deal with the merits of petitioner's security status did not make the ruling as to the Government's lack of power or authority any less final or any less favorable.

See *Harmon* v. *Brucker*, 355 U.S. 579.[5] And when the expungement order of the District Court is added to the opinion of this Court, the result is a final and conclusive determination eradicating all adverse administrative rulings and reinstating an earlier final and favorable ruling of an administrative nature. A more final or favorable determination would be difficult to imagine.

(3) The Government tries to convert the requirement of Paragraph 26 that there be "a final determination . . . favorable to a contractor employee" into a showing "that he was entitled to clearance during the period for which he claims damages by reason of the denial of clearance." Brief, p. 13. Here again the Government seeks refuge for such an attempt in the language of the 1960 Directive, stating (Brief, p. 13) that this "is what the 1960 provision expressly requires." It is then blandly stated that "whether his claim is judged under the old or the new regulation, under the circumstances of petitioner's case, the test is the same." Brief, p. 13.

The gross unfairness of this not-so-subtle shift from the 1955 Directive to the 1960 Directive is at once obvious. Whereas Paragraph 26 of the 1955 regulation speaks simply of "a final determination . . . favorable to a contractor employee," Paragraph V.C. of the

[5] An administrative determination by the Secretary of Defense as to the lack of authority to revoke a prior security clearance could hardly be said to be wanting in finality or favorableness. And a judicial determination to that effect is at least as final and favorable, if not more so. See *Burrell* v. *Martin*, 232 F. 2d 33, 38-39 (App. D.C.), and *Almour* v. *Pace*, 193 F. 2d 699, 701, fn. 6 (App. D.C.), for the practical effect a judicial adjudication may have on a Government employee's right to collect back pay for the period of an illegal discharge.

1960 regulation refers to "a final administrative determination . . . that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest." Thus the 1960 provision requires not only an administrative determination but defines the nature of that determination in terms of present access authorization. No similar requirements are to be found in the 1955 Directive. Serious questions as the validity of retroactively applying a 1960 standard to a claim filed under a 1955 regulation would be raised if the Government's reading were accepted. See *Miller* v. *United States*, 294 U.S. 435, 439; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202. As this Court said in *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199, "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retroactive operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"

But it may be questioned whether, even if the 1960 standard be applied to petitioner's claim, there is any need to show that he was entitled to clearance during the period for which he claims damages. Not even Paragraph V.C. of the 1960 Directive makes that requirement. And the Government's Brief (p. 13), after flatly stating such to be the requirement, quickly withdraws to a restatement of the standard—"the required determination is simply that an authorization 'would be' granted upon demand and a showing of need."

In other words, the 1960 Directive requires that there be a determination not of past access eligibility but of present and future eligibility. Any intention in the 1960 Directive to review past eligibility is contained in the provision of Paragraph V.C. requiring that the board making the new access eligibility determination also decide "that the administrative determination which resulted in the loss of earnings was unjustified." But the Government has conveniently excised that provision in its Brief (p. 14), the Department of Defense having advised the Department of Justice "that no such showing will be required here, in light of the fact that petitioner's claim was initially filed under the 1955 regulation, at a time when the actual practice was not to undertake a separate review of the correctness of the initial decision."

Thus the Government comes full swing back to the stark simplicity of the language of Paragraph 26 of the 1955 Directive, conceding that it does not encompass a further review of the adverse initial determinations. All that is really left of the hop-scotch effort to infuse Paragraph 26 with some of the conditions set forth in the 1960 Directive is the unwarranted assertion that Paragraph 26 somehow incorporates the 1960 requirement that there be a new administrative determination that the grant of an access authorization equivalent to that which was revoked would be clearly consistent with the national interest. In short, the contention is that, to obtain restitution under Paragraph 26, there must be a determination as to the individual's *present* access eligibility.

The complete answer, of course, is that Paragraph 26 makes no such requirement. And there is no compelling reason advanced why such a requirement should

be read into that provision by implication. Certainly there is no necessary relationship, absent express language in Paragraph 26, between petitioner's present access eligibility and his entitlement to restitution for a past period of time. Even if he were to be considered presently ineligible for access authorization, there is still "a final determination" favorable to him for the period for which he claims damages. The Government, moreover, asserts no overriding public interest which compels restitution to be conditioned on present access eligibility. Indeed, the public interest expressed in Paragraph 26 of providing reimbursement for those who were unfairly and improperly deprived of their jobs would seem to preclude such an unexpressed condition.

The incongruity of requiring a present access eligibility determination in the circumstances of this case is emphasized by the complete lack of any need for such a determination on petitioner's part. He is not presently employed in a defense industry and has no need or desire to secure any determination as to his access eligibility. Thus he is not eligible to seek a security clearance or an access eligibility determination at this time.[6] And any effort to impose the re-

[6] The present Department of Defense Industrial Security Manual for Safeguarding Classified Information (Revised, Dec. 31, 1962), p. 31, Par. 19, Sec. III, provides that "A personnel security clearance action for a person shall not be initiated prior to the employment of the individual by a [defense] contractor." See also the substantially identical provision in the earlier 1960 edition of the Manual, 1 CCH Govt. Contracts Rept. ¶8667, par. 19, Sec. III, p. 13,182.

Thus, contrary to the Government's assertion (Brief, pp. 13-14), a finding of present eligibility for security clearance is inappropriate when the claimant neither needs such clearance nor is employed by a defense contractor at the present time. The technical difference between such a finding and an access authorization does not negate the conditions precedent to that finding.

quirement of such a finding on this petitioner falls into the category of insisting upon an advisory opinion unrelated to need, eligibility or the equities involved in the deprivation of petitioner's job rights. That is indeed a poor reason for reading such an irrelevant condition into the plain wording of Paragraph 26.

(4) Finally, the Government seeks to analogize this case to a criminal proceeding where the Court "in effect vacated the judgment, leaving the charge and the resulting suspension in effect,[7] and remanded the matter for a 'new trial' by correct proceedings, should petitioner wish to pursue the case." Brief, p. 12. Admittedly, this analogy "is not altogether satisfactory." *Ibid.* But in fact the analogy is totally inapposite.

When this Court declared that the Department of Defense officials lacked authority to deprive petitioner of his job, it did more than declare that some procedural defect had marred the proceeding and therefore warranted a new trial. In effect this Court held that the Department of Defense lacked jurisdiction to do what it did to this petitioner. And the monetary injuries which petitioner suffered were the direct result

[7] As a result of this Court's opinion and the ensuing expungement order of the District Court, there is no charge or resulting suspension left in effect. The original charges against petitioner resulted in favorable determinations as to his security clearance, determinations which remain on the record. The critical adverse determination was that summarily made on April 17, 1953, by the Secretary of the Navy, which resulted in the loss of petitioner's job at ERCO. That determination has now been expunged. There was a subsequent letter, dated April 9, 1954, from the EIPSB reiterating the original charges and contemplating a further but limited hearing conducted without confrontation or cross-examination of witnesses. See R. 9, No. 180, Oct. Term, 1958. That letter did not suspend any clearance which petitioner then had and obviously is without significance now.

of that unwarranted action of the United States, proceeding without authority or jurisdiction.

Under these circumstances, this Court's judgment cannot be construed, by implication or otherwise, as a direction or authorization for a new security hearing that might result in revoking his employment rights again as of April 23, 1953. Cf. *Stickney* v. *Wilt*, 23 Wall. 150. This Court, as well as the District Court in entering its expungement order, made a final determination as to the voidness of the 1953-1956 proceedings causing petitioner's loss of employment. "Whatever was before the Court, and is disposed of, is considered finally settled." *Sibbald* v. *United States*, 12 Pet. 488, 492; *N.A.A.C.P.* v. *Alabama*, 360 U.S. 240, 244-245. The Government cannot now undo what the Court has decided and invest itself with authority to legitmiatize the 1953-1956 action in causing petitioner's loss of employment. Particularly is that undoing improper where such action has been found to have infringed upon constitutionally-protected rights and to have caused irreparable injury and damage.

The force of all these various considerations arising out of the Government's analysis is such as to compel a reading of Paragraph 26 favorable to petitioner's right to recover compensation for past losses. Nothing in the language or context of Paragraph 26 prohibits such recovery. Indeed, that language and that context permit a full recognition of the equity and justice underlying petitioner's claim, as well as a recognition of the legal conseqeunces of the decision in *Greene* v. *McElroy*. The failure of the Court of Claims so to read Paragraph 26 was plainly erroneous.

4. The Principles of the Just Compensation Clause Justify An Award to the Petitioner and Underscore the Proper Interpretation of Paragraph 26

When the United States takes private property for public use, the Just Compensation Clause of the Fifth Amendment commands that just compensation must be paid therefor. It is that provision that has given rise to petitioner's alternative claim for just compensation in this case.[8]

The constitutional problems thus brought into focus relate not only to the propriety of this claim but also bear heavily upon the proper interpretation to be accorded Paragraph 26 of the 1955 Directive. In addition to the general principle that a regulation should be construed so as to avoid the constitutional problems which might otherwise be raised (see, e.g., *Peters* v. *Hobby*, 349 U.S. 331, 338; *Communist Party* v. *Control Board*, 351 U.S. 115, 122), Paragraph 26 should not be read as granting petitioner less than his constitutional due. The purpose of this back pay provision, to grant "equity and justice" to those employees "relieved [of their jobs] at the suggestion of representatives of the Federal Government,"[9] would seem plainly to reflect a desire on the part of the Government to give the injured employee the equivalent of what he

[8] Petitioner makes no assertion of a compensation claim under the Due Process Clause of the Fifth Amendment. The statements in the Government's Brief (pp. 19-22) as to such a claim are therefore irrelevant.

[9] See Hearings Before the House Committee on Appropriations on Department of Defense Appropriations for 1958, 84th Cong., 1st Sess., p. 777, quoted at page 28 of Petitioner's Main Brief. The Brief for the United States nowhere explains how the Government's position in this case can be reconciled with that of the Department of Defense during those hearings.

would otherwise be entitled to as a matter of just compensation.

The basic premise of petitioner's right to just compensation is the recognition in the *Greene* decision, 360 U.S. at 492, that the right to hold specific employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment. That petitioner was deprived of his "property" right in holding employment at ERCO is now beyond dispute. And he was deprived of it, to his injury, by actions of the Government, actions described by this Court as "in the nature of adjudications affecting legal rights." *Hannah* v. *Larche*, 363 U.S. 420, 451. Thus petitioner's "property" has been interfered with, taken and destroyed by the Government. And the resulting damage renders the Government liable under the Just Compensation Clause.

The Brief for the United States, however, flatly denies that there is any basis for an award under the Just Compensation Clause. It questions whether the "property" interfered with comes within the "private property" concept of the Clause and whether, under the circumstances, it was "taken for public use." And the Government asserts that, in any event, the lack of authority for the Governmental action completely immunizes the United States from liability under the Just Compensation Clause.

(1) The suggestion, which is not firmly articulated in the Government's Brief (see pp. 22-23), that "property" has a different meaning in the Due Process Clause of the Fifth Amendment than it has in the Just

Compensation Clause, cannot seriously be maintained.[10] Indeed, this Court has consistently read into the Due Process Clause of the Fourteenth Amendment an obligation on the states to grant just compensation for the taking of private property, although the Fourteenth Amendment contains no parallel provision to the Just Compensation Clause of the Fifth. See, e.g., *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226.[11]

(2) Likewise inadmissible is the suggestion by the Government (Brief, p. 23) that petitioner's property right in his job is "a purely abstract right" which is not "susceptible of transfer" and hence is not "property" for which the Government owes compensation. This Court's deep concern with the right of every citizen to follow any lawful calling, business or profession he may choose free from unwarranted and unauthorized interference reflects a solicitude for something more significant than "a purely abstract right." As long ago as 1889, this Court in *Dent* v. *West Virginia*, 129 U.S. 114, 121-122, put to rest any notion that the right to employment is more abstract or less meaningful than the right to own real or personal property:

> This right [to follow any lawful calling, business or profession] may in many respects be considered

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[10] In his dissenting opinion in *General Box Co.* v. *United States*, 351 U.S. 159, 168-169, Mr. Justice Douglas, joined by Mr. Justice Harlan, noted that if the timber involved in that case was, as the Court conceded, "property" so far as the Due Process Clause is concerned, it would seem to be "property" within the meaning of the Just Compensation Clause of the same Amendment.

[11] Similarly, "property" for just compensation purposes under the Fifth Amendment is "property" for the same purposes under the Fourteenth Amendment. Compare *United States* v. *Causby*, 328 U.S. 256, with *Griggs* v. *Allegheny County*, 369 U.S. 84.

> as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and *cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken.* [Emphasis added.]

Moreover, the Government itself appears to concede (Brief, p. 23) that the "property" referred to in the Just Compensation Clause is not limited to realty or personalty. Patent rights (*James* v. *Campbell*, 104 U.S. 356) and contract rights (*Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106) are among the non-physical things that have long been recognized as included within this constitutional concept of "property."[12] But the outer limits of the "property" covered by this Clause are not definable by the truism (Brief, p. 23) that not all rights or economic interests are included. What is critical is that legal protection be

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[12] The other decisions relied upon in the Government's Brief, p. 23, all deal with the measure of compensation rather than the question whether compensation is due. These cases show that in computing the amount due an owner of property taken by the United States the general market value rather than the owner's personal attachment must be the basis of valuation. But these cases do not support the proposition, for which the Government apparently cites them, that property whose market value cannot be determined can be appropriated by the United States without any payment whatever. In the instant case, there has never been any question but that the value of the property taken from the petitioner is the equivalent of his loss of earnings caused by the Government's action. If petitioner were claiming an award to cover his personal enjoyment and satisfaction in being an aeronautical engineer or his personal attachment to ERCO, the cases cited by the Government would be in point.

available for the interests at stake. As this Court stated in *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502, "only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." In short, "economic uses are rights only when they are legally protected interests." *Ibid.*, 503. And since this Court in the *Greene* case has already held that petitioner's right to employment is included among the "legally protected interests," it must be considered within the scope of the Just Compensation Clause.

(3) The contention of the Government (Brief, pp. 23-24) that there was here no "taking" of property in the constitutional sense since the United States did not and could not acquire petitioner's personal right to employment ignores the settled proposition that a constitutional "taking" may involve something more than acquisition and destruction. In the words of this Court's opinion in *United States* v. *General Motors Corp.*, 323 U.S. 373, 378:

> In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

And since the sovereign here acted so as to destroy petitioner's interest in his continued employment, there has been a "taking" of that interest for purposes of the Just Compensation Clause. The inability of the United States to acquire or use that interest does not detract from the deprivation suffered by the petitioner.

(4) The assertion by the United States (Brief, p. 24) that the governmental invasion of petitioner's property right can be likened to a noncompensable frustration of an enterprise is plainly unsound.[13] Loss of profits and prospective business opportunities, which characterize a "frustration," are generally the indirect by-products of valid or necessary governmental action and hence are noncompensable. See *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 286. But in this case the injury to petitioner's property interest was direct and undenied. Just as the "direct and immediate result" of the governmental action "was to take from claimant its contract and its rights thereunder" in *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 120[14]—

[13] This contention that there was merely an indirect injury to the petitioner bears a strong resemblance to the position advanced earlier by the Government in *Greene* v. *McElroy*, 360 U.S. at 492, that "the admitted interferences which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information and hence are not unreasonable and do not constitute deprivations within the meaning of the [Fifth] Amendment." The Court found it unnecesary to pass upon the validity of that contention, but it did rule that the governmental action was totally unauthorized.

[14] The Court in *Brooks-Scanlon*, 265 U.S. at 120-121, carefully distinguished *Omnia Co.* v. *United States*, 261 U.S. 502, relied upon by the Government here (Brief, p. 24), by pointing out that in *Omnia* the United States had not expropriated the contract itself but had merely made impossible the fulfillment of the contract. Thus if the Government in the instant case had cancelled its con-

thereby rendering the Government liable to pay compensation—so here the direct and immediate result of the governmental action was to take from petitioner his employment contract and his rights thereunder.

(5) Finally, the obligation of the United States to pay just compensation is not to be denied by the fact that the actions of the Defense Department officials that immediately caused the deprivation of petitioner's property rights were found to be unauthorized. The gravamen of a just compensation claim is that the sovereign—not individual officers thereof—has taken property for public use without paying compensation. Here the United States has consistently maintained that it may take petitioner's job rights for what it conceives to be public necessity in terms of limiting the dissemination of secret military information.[15] It continues to assert that right, even to the point of urging that it may now reexamine the situation in light of *Greene* v. *McElroy* and eventually, if it so desires, reaffirm past actions. In other words, quite apart from the past unauthorized actions of the Defense Department officials, the United States does not disavow its sovereign power to deprive petitioner of his security

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tract with ERCO and petitioner had lost his job as a result, *Omnia* would be in point. But the *Greene* decision makes clear that the Government directly deprived petitioner of his job. The *Brooks-Scanlon* doctrine thus controls.

[15] The basic premise of the Government's argument in the *Greene* case (Brief for the United States, p. 23, No. 180, Oct. Term, 1958) was that the "power of the executive department to control, in the internal operations of the executive branch, the dissemination of secret military information is peculiarly and primarily an *executive* power." That Brief consistently asserted that the action of removing Greene from his job was that of "the Government."

clearance and his employment rights. When, in the course of exercising such power, the United States has injured an individual just compensation should be paid. Accordingly, both the 1955 and 1960 Directives constitute express recognitions that the source of any reimbursement is the United States and not any individual officers thereof.

Indeed, the whole philosophy of the just compensation concept is that economic losses inflicted by the exercise of governmental power should fall upon the public rather than upon those individual citizens who happen to lie in the path of the exercise of that power. *Armstrong* v. *United States*, 364 U.S. 40, 49; *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502. And that is the philosophy which underlies Paragraph 26 of the 1955 Directive, designed as it is to achieve "equity and justice" for those contractor employees who are injured by the action of the Government.

CONCLUSION

The foregoing considerations, supplementing those in Petitioner's Main Brief, require a reversal of the judgment of the Court of Claims and a remand to that court for the appropriate computation of the back pay due to petitioner.

Respectfully submitted,

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